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Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. GALBRECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

EARLE STRONG,
310 McFaddin Bldg.
P. O. Box 1632
Beaumont, Texas

CHARLES S. PIPKIN,
LOUIS V. NELSON,
Attorneys for Respondents.

BUNCE PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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IN THE

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No. 532

C. D. CALBECK, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

BRIEF OF RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 13, 1961 in the case of The Travelers Insurance Company and Levingston Shipbuilding Company v. C. D. Calbeck, Deputy Commissioner.

QUESTION PRESENTED

Whether the coverage provisions of Section 903(a) of the Longshoremen's and Harbor Workers' Compensation

Act allow the State of Texas to provide the exclusive remedy for an injury sustained by a Texas employee while performing the work of a welder upon the hull of a barge that was afloat upon navigable waters but still under construction.

STATEMENT

At the time of the accident made the basis of the claim of the McGuyers in the Calbeck case, the employer and the employee were covered by the Texas Workmen's Compensation Act, and the employer was a subscriber under the terms of said Act. (R. 4) The Texas Workmen's Compensation Act provides that it is the exclusive remedy for injuries sustained in the course of employment; Article 8306, § 3, Vernon's Revised Civil Statutes, 1925, as amended.[1]

After the death of the employee, the McGuyers filed claim for death benefits under the Texas Workmen's Compensation Act with the Industrial Accident Board of the State of Texas and later filed claim with the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act. (R. 4) One formal hearing was held Friday, June 13, 1958, which resulted in the Compensation Order dated February 18, 1959, rejecting the claim. (R. 19-22) Thereafter, a second Compensation Order was entered July 30,

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[1] Vernon's Revised Civil Statutes of Texas, Art. 8306, §3:

> "The employes of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employe of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer or his agent, servant or employe for damages for injuries resulting in death, *but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for* * * *" (Emphasis ours.)

1959, modifying the original Order to the extent of finding that the accidental injury occurred within the boundaries of Calcasieu Parish, Louisiana. (R. 23-25) The Compensation Order originating this litigation was dated May 13, 1960, awarding compensation under the Longshoremen's and Harbor Workers' Act to the claimants McGuyer. (R. 13-18)

ARGUMENT

The Court of Appeals Decision Follows the Settled Law

Under "reasons for granting the writ" Petitioners state "it (the rulings of the United States Court of Appeals for the Fifth Circuit) presents an important question in the administration of the Longshoremen's Act which affects many thousands of shipyard workers." (Petition, 9) It is noted that Petitioner does not say that the Court of Appeals "has decided an important question of Federal law which has not been, but should be, settled by this Court." (Rule 19). The obvious reason is because it is well settled that injuries upon new construction are under State Acts. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922).

As said in the Opinion made the basis of this Petition, per Circuit Judge Brown, "As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear as day or as black as night?"[2]

In passing the Longshoremen's and Harbor Workers' Act of 1927, the intent of Congress was to fill the gap left by the *Jensen* decision, and to provide the modern form of compensation for injuries or death involving maritime workers that could not be validly provided for by the sev-

[2] Petition for Writ of Certiorari, Appendix A, pages 21-22.

eral states.[3] The Act was passed in 1927 with Congress fully aware of the line of demarcation[4] that had been drawn between those injuries on navigable waters which could be covered by State Acts, *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), 42 S. Ct. 157 (new construction); *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926) (removal of submerged obstructions) and those which could not, *Atlantic Transport Company* v. *Imbrovek*, 234 U.S. 52, 58 L. Ed. 1208, 34 S. Ct. 733 (loading and unloading a vessel), *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 69 L. Ed. 372 (1925), 45 S. Ct. 157, *Great Lakes Dredge & Dock Company* v. *Kierejewski*, 261 U.S. 479, 67 L. Ed. 756 (1923), 43 S. Ct. 418, *Lee* v. *Fletcher Company*, 4 F. 2d 3 (C.C.A. 3rd, 1925) (repair or reconversion of a vessel.)

This line of demarcation was recognized in Section 903(a) wherein the Act provided "but only *** if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law ***", 33 U.S.C.A. 903(a). This was said in *Davis* v. *Department of Labor and Industries*, 317 U.S. 249, at pages 252 and 253:

> "*** March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901, et seq. Here again, however,

[3] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 255:

> "* * * The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * *"

[4] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 256:

> "* * * In our decision in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction. * * *"

> *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Emphasis ours)

After the passage of the Longshoremen's and Harbor Workers' Act and prior to the instant two cases, the only time the matter has been before any Federal Court was in the case before the Fourth Circuit in *U. S. Casualty Company* v. *Taylor*, 64 F. 2d 521 (4th Cir. 1933; cert. denied, 290 U.S. 639) and in which that Court readily recognized that the above noted provision of Section 903(a) excluded injuries upon new construction because workmen's compensation might be validly provided by State law.[5]

The Court of Appeals Decision Is in Accord With Applicable Decisions of This Court

The decisions below have not "decided a federal question in a way in conflict with applicable decisions of this Court", as provided by Rule 19, nor are the decisions below "con-

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[5] 64 F. 2d 521, at page 524, the Court said:

> "We conclude * * * that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *
>
> * * *

64 F. 2d 521, at page 525:

> "It follows that the deputy commissioner was barred from awarding compensation in this case by the limitation imposed by section 903(a) of the act."

trary to the standards which this Court has applied in determining the coverage of the Longshoremen's Act," as stated in the Petition, page 9. On the contrary, the decisions below conform to the applicable decisions of this Court as did two prior decisions by the same Court, in *Flowers* v. *Travelers Insurance Company*, 258 F. 2d 220, cert. denied, 359 U.S. 290, and *Noah* v. *Liberty Mutual Insurance Company*, 267 F. 2d 218.

It is contended by Petitioners that *Davis* v. *Department of Labor*, 317 U.S. 249, rejected the applicability of that portion of Section 903(a) of the Longshoremen's and Harbor Workers' Act providing "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law". This cannot be so, for in the *Davis* case this Court reversed the decision of the Supreme Court of Washington, which had held that the Washington Compensation Act could not apply to the injury and death of the employee involved. The opinion by Mr. Justice Black states the opposite of Petitioner's contention:

> "**** March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." (317 U.S. 252-253)

The *Davis* decision further reaffirmed the pre-existing *Jensen* line of demarcation:

> "**** In our decision in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, we held that Congress has by the Longshoremen's Act accepted the

Jensen line of demarcation between state and federal jurisdiction. ****" (317 U.S. 256)

After reaffirming the *Jensen* line of demarcation and the applicability of the coverage limitation provision of Section 903(a), the *Davis* decision simply held that where the facts of the case did not fall within the pre-existing *Jensen* line of demarcation and are within a 'twilight zone' that, aided by the presumptions of constitutionality of the State Act, there was no constitutional obstacle to recovery under the Workmen's Compensation Act of the State of Washington.[6]

The latest pronouncement by this Court is in *Hahn* v. *Ross Island Sand & Gravel Company*, 358 U.S. 272. The Court again recognized the coverage limitation provision of Section 903(a) wherein in a per curiam decision it is said at page 272:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings *may* * * * *validly be provided by State Law*.' § 3, 44 Stat. 1426, 33 U.S.C. §903(a), 33 U.S.C.A. §903(a), (emphasis supplied) * * *"

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[6] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 257:

> "* * * We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state."

and at page 258:

> "* * * Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited.
>
> "Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the pgtitioner's recovery. * * *"

Further, the *Hahn* case recognized that the twilight zone theory of *Davis* was only applicable in cases where "it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitations of Southern Pacific Co. v. Jensen." (358 U.S. 272-3). Also the opinion in *Hahn* recognizes that the employee's election is limited to twilight zone cases:

> "* * * Of course, the employee could not do this if the case were not within the twilight zone for then the Longshoremen's Act would provide the exclusive remedy. * * *" (358 U.S. 273).

Petitioner cites *Bethlehem Steel Company* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478, and *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549. (Petition, page 12). But in each of these cases this Court recognized recovery under the state law. In *Moores* case this Court affirmed the State Court's judgment awarding compensation under the Massachusetts Act, citing *Davis*. In *Baskin* this Court reversed the State Court's denial of state compensation to allow the California Court to reconsider its interpretation of *Davis* in the light of the affirmance of *Moores* case. These two cases are a clear recognition of the applicability of the State Workmen's Compensation in light of the twilight zone theory and the presumptions in favor of the constitutionality of the State statutes as stated in *Davis*.[7]

Petitioner relies upon *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366. In the *Avondale* case, the 5th Circuit (201 F. 2d 437) had before it an attempt to set aside an

[7] See Note 6.

award under the Longshoremen's Act. At the time of the accident, the employee was cleaning a tank of a barge[a] that had been drawn up on a marine railway. There was no contention that the work the employee was doing was not maritime; the only contention was that a marine railway (on which the vessel is drawn out of the water) was not "any dry dock" as provided in Section 903(a) of the Longshoremen's Act.[b] The Fifth Circuit allowed recovery under the Longshoremen's Act and this Court affirmed that decision in a per curiam opinion citing *Davis*, *Baskin* and *Moores*. The concurring opinions by Mr. Justice Burton and Mr. Justice Douglas simply recognize the soundness of the holding below that a marine railway is "any dry dock" within the meaning of the Act. The affirmance by the majority of this Court in a per curiam opinion, citing *Davis*, *Moores* and *Baskin* merely recognizes that *Davis* is authority for applying the twilight zone theory to the locale of the accident as well as to the maritime character of the work.

The Decision Is Not in Conflict With the Decision of Another Court of Appeals on the Same Matter

The Petition complains that the decisions of the Fifth Circuit in the instant two cases "conflict in principle" with the decisions of three circuits. (Petition, 15) Cited are the

[a] 346 U.S. at page 366:

"* * * in that the decedent, at the time of receiving his fatal injury, was engaged in cleaning a tank of a barge * * *"

[b] *Avondale Marine Ways, Inc.* v. *Henderson*, 201 F. 2d 437, at page 438:

"* * * In short, its position was that the language, 'navigable waters of the United States, including any dry dock', as those words are used in Section 3(a) of the Act, 33 U.S.C.A. §903(a) does not extend to and include the marine railway."

llowing: *The Travelers Insurance Co.* v. *McMannis*, 139 2d 949; *Newport News Shipbuilding & Dry Dock Co.* v. *Hearne*, 192 F. 2d 968; *Morrison-Knudsen Co.* v. *O'Leary* s F. 2d 542, cert. denied; *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2d 304.

In *Travelers Insurance Company* v. *McMannis*, *supra* Fourth Circuit allowed the application of the Longshoremen's Act to an injury occurring on the construction a dry dock from which the water had been pumped out the time of the accident. The decision specifically recogd the maritime distinction between building a new ship l repairing a completed vessel,[1] but held this distinction analogous to the facts.[2] The decision clearly recogs that an injury may be excluded by that portion of tion 903 a) of the Act wherein it is provided "* * * but * * * if recovery for the disability or death through kmen's compensation proceedings may not validly be vided by state law * * *"[3] but simply held that the said

[1] The opinion states at 139 F. 2d 95

"* * * An analogy is drawn with the historic distinction which the courts have made between work performed in the building of a ship which is not considered maritime and work upon a completed ship which partakes of this character. See Frankel v. Bethlehem-Fairfield Ship Yard, 4 Cir., 132 F. 2d 644, United States Casualty Co. v. Taylor, 4 Cir., 64 F. 2d 521."

[2] 139 F. 2d 949 at page 952

"It is not material that in the pending case the drydock was not finished. Not only was the locality within the maritime jurisdiction, but the work was maritime in its nature. We do not think that a distinction should be drawn in this respect between an unfinished and a finished structure in analogy to the distinction between a completed ship and one in the course of construction. * * *"

[3] 33 U.S.C.A., Section 903 (a).

provision was not applicable to the facts of the case.[14] Obviously the *McManigal* case was merely a twilight zone case following *Davis* v. *Department of Labor* and so recognized by the Fourth Circuit with extensive quotations from *Davis*.[15]

In *Newport News Shipbuilding & Dry Dock Co.* v. *O'Leary*, *supra*, the Fourth Circuit decision merely held that an injury received while repairing a dry dock that was in another dry dock for repairs was compensable under the Longshoremen's Act because the repair of a dry dock was just as much a maritime service as the repair of a vessel. The decision again recognized coverage limitation contained in Section 903(a) of the Act and said "we hold that the case falls within the purview of the Federal statute and *outside the permissible scope of the state enactment*. (Emphasis ours.) 192 F. 2d 968, 971.

In *Morrison-Knudsen Co.* v. *O'Leary*, *supra*, there was involved the drowning of a worker who was using a boat on the waters of a tunnel which tunnel had been used to divert the water of a navigable stream, and the Ninth Circuit merely held that the evidence before the Commissioner was sufficient to support his findings of both maritime employment[16] and navigable waters.[17]

[14] The Court said in 139 F. 2d 949, at pages 952-953:

"This discussion disposes of the argument that the whole matter was one of local concern within the jurisdiction of the State Commission and therefore excluded from the jurisdiction of the federal commission by the exception in §3 of the Act. * * *"

[15] The Court quotes from Davis v. Department of Labor, in 139 F. 2d 949, at pages 951-952.

[16] Maritime employment: In 288 F. 2d 542, 544:

"Under the facts herein, at the specific time and place both employer and employees were engaged in maritime employment."

[17] Navigable waters: In 288 F. 2d 542, 544:

"* * * the waters in the tunnel were at the time of the accident navigable waters of the Snake River."

In *Dixie Sand & Gravel Corporation* v. *Holland*, *supra*, the employee, at the time of the injury, was working with and acting as a night watchman, making the rounds of the employer's barges. The employee had completed the inspection of the outermost barge and on his return to shore slipped between the barges and fell into the river and drowned.[17] This was a typical maritime service. The decision of the Sixth Circuit held that there was no finding by the Deputy Commissioner expressly as to whether the deceased employee was acting in the course of his employment and remanded the case for such finding.[18]

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[17] The Court cites the facts at 255 F. 2d 304, 306:

> "• • • On the night of November 23, 1954, Holland voluntarily told the night watchman that he would go with him when he made his eleven o'clock rounds and help check the barges before he left. • • •"

and at page 311:

> "Holland and Bowman had made their way to the outermost barge before Holland, on their return to shore, slipped between the barges and fell into the river."

[18] The Court said at 255 F. 2d 304, 309:

> "We are unable to say with any degree of certainty that the Deputy Commissioner's finding that 'the claim filed by the dependents does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act' is, in fact an independent finding that Holland's death did not arise out of and in the course of his employment. We are unable to adequately review the ruling in this case without an express finding by the Deputy Commissioner on that issue. • • •"

and again on page 311:

> "The judgment of the District Court is vacated, and the action remanded to the District Court with instructions that it remand the action to the Deputy Commissioner for a finding by him based on all the evidence whether the decedent's death arose out of and in the course of his employment within the meaning of the Act. • • •"

SUPPORTING ARGUMENT AND THE TEXAS ACT

Respondent respectfully submits that the foregoing argument clearly shows that the decisions below only announce the settled law that the employees, employers and insurance carriers have followed for many years.

In The Travelers Insurance Company case twice Deputy Commissioner Calbeck rejected the claim of the McGuyers (R. 19, 23), and in his decision of February 18, 1959 gave as his reason "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act". (R. 22) In the principal opinion in The Travelers Insurance Company case, per Circuit Judge Brown, this was recognized "as a convincing demonstration that until these two cases there was no serious contention that new construction work was covered." (Petition, Appendix A, page 24).

In the hearing in The Travelers Insurance Company case, Mr. Cecil Beeson, Personnel Manager of Levingston Shipbuilding Company, stated that he is in charge of handling the claims for injuries received at his employer's place of business; had been there for fifteen years prior to the accident made the basis of this claim; had always reported injuries on new construction to the Industrial Accident Board of the State of Texas; and that they had never refused to take jurisdiction of such injuries. (R. 53, 54).

The primary obligation to care for its employees is upon the State and the State of Texas has protected its employees with a Workmen's Compensation Act since 1913. (Acts 1913, 33rd Leg., Chap. 179, p. 429, Art. 8306, et seq., V. R. C. S. 1925). The Texas Act does not exclude from its coverage injuries occurring upon navigable waters, and the Texas Courts have allowed recovery. *Brown* v. *Aetna*

Casualty & Surety Company, 145 S.W. 2d 171, (Tex. Comm. App. 1940, opinion adopted by S. Ct.); *Emmons* v. *Pacific Indemnity Company*, 208 S.W. 2d 884 (Tex. S. Ct. 1948); *Indemnity Insurance Company of North America* v. *Marshall*, 308 S.W. 2d 174 (Beaumont Civ. App. 1957, w. o. ref., n.r.e.)

The Texas Act provides that it is the exclusive remedy, Article 8306, §3, V.R.C.S., 1925, as amended.[19]

The United States Supreme Court has recognized the applicability of the Texas Act to navigable waters and its exclusiveness in *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). The Court there held that although the employee's work might be sufficiently maritime to give him other causes of action, nevertheless it was sufficiently of local concern that the State of Texas could validly compensate him and his beneficiaries by the Texas Workmen's Compensation Act, and since the Act contained a provision that it was the exclusive remedy, the employee and his beneficiaries would be limited thereto:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." 270 U.S. 64-65

Respondents respectfully submit that the Court of Appeals below in The Travelers Insurance Company case, has followed the line of demarcation between the State

[19] See Note 1.

Acts and the Longshoremen's and Harbor Workers' Act that has always existed and been recognized by the Courts, employers, their insurance carriers, employees, attorneys, and State Workmen's Compensation Boards. Any change should be by Congress if it can be done constitutionally. It is Respondents' understanding that a bill was introduced in the last session of Congress to make the Longshoremen's and Harbor Workers' Act applicable to the construction of vessels and that it was referred to the Committee on Labor and Public Welfare.[20]

[20] 87th Congress, 1st Session, S. 2415; In the Senate of the United States; August 14, 1961; Mr. Smith of Massachusetts introduced the bill; which was read twice and referred to the Committee on Labor and Public Welfare.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Ewell Strong

EWELL STRONG
CHARLES S. PIPKIN
LOUIS NELSON
Attorneys for Respondents,

The Travelers Insurance Company and Levingston Shipbuilding Company